

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ANTHONY D. MCCULLOM,)
Petitioner,)
v.) Nos. 1:03-CR-12-TRM-1
UNITED STATES OF AMERICA,) 1:16-CV-168-TRM
Respondent.)

MEMORANDUM OPINION

Before the Court is Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 54]. Petitioner bases his request for collateral relief on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*; Doc. 55]. The United States responded in opposition on July 1, 2016 [Doc. 57]; Petitioner replied on July 25, 2016 [Doc. 61]. For the reasons below, Petitioner's § 2255 motion will be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

In 2003, Petitioner pled guilty to, and was subsequently convicted of, four Hobbs Act robberies, all in violation of 18 U.S.C. § 1951; and two counts of using and carrying a firearm during and in relation to a crime of violence, both in violation of 18 U.S.C. § 924(c) [Docs. 28, 47]. This Court sentenced Petitioner to an aggregate term of 247 months' imprisonment on November 4, 2003 [Doc. 47]. Petitioner did not file a direct appeal of his conviction or sentence.

On June 1, 2016, Petitioner filed the instant motion challenging his conviction under § 924(c) based on the *Johnson* decision [Doc. 54].¹

II. STANDARD OF REVIEW

To obtain relief under 28 U.S.C. § 2255, Petitioner must demonstrate “(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid.” *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He “must clear a significantly higher hurdle than would exist on direct appeal” and establish a “fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process.” *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

III. ANALYSIS

Petitioner argues that the *Johnson* decision invalidated the residual clause in § 924(c)(3)(B)’s definition of crime of violence and that the absence of that provision requires vacatur of his conviction under § 924(c)(1)(A). The argument fails because binding Sixth Circuit precedent holds that while *Johnson* invalidated the residual provision of the ACCA, § 924(c)(3)(B)’s definition of crime of violence remains unaffected.² *See; United States v. Taylor*,

¹ The Court finds that it need not determine whether the petition is timely under § 2255(f)(1) because, even if the § 2255 motion was filed within the applicable one-year statute of limitations, the *Johnson* decision does not provide a basis for granting the requested relief.

² The ACCA mandates a 15-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). The statute defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the “use-of-physical-force clause”); (2) “is burglary, arson, or extortion, involves the use of explosives” (the “enumerated-offense clause”);

814 F.3d 340, 376–79 (6th Cir. 2016) (recognizing at least four “significant differences” between the residual clause in § 924(c)(3)(B) and the ACCA’s residual clause and noting “the argument that *Johnson* effectively invalidated [the former] is . . . without merit”). As such, Hobbs Act robbery remains a crime of violence under § 924(c)(1)(A).

IV. REQUEST FOR A STAY

To the extent that Petitioner requests in his reply that the Court “stay the issuance of its decision on [the instant] petition” pending resolution of a government-filed writ of certiorari in a Ninth Circuit decision addressing impact of the *Johnson* decision on § 924(c) and possible request for rehearing *en banc* by the petitioner in the *Taylor* decision [Doc. 61 pp. 2–3], the Court declines.

The binding nature of the *Taylor* decision is in no way altered by the fact that other Courts of Appeal have reached the opposite conclusion about the impact of the *Johnson* decision on § 924(c)’s residual clause or the fact that the Sixth Circuit reached a different conclusion in the context of 18 U.S.C. § 16(b). Nor is the binding nature of the *Taylor* decision impacted by the potential for a rehearing *en banc*. *See, e.g., United States v. Matos*, No. 3:13-cr-98, 2014 WL 1922866, at *3 (W.D. Ky. May 14, 2014) (explaining that a “district court is bound to follow the

or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B). It was this third clause—the residual clause—that the Supreme Court deemed unconstitutional in the *Johnson* decision. 135 S. Ct. at 2563.

Section 924(c)(1)(A) makes it a crime for an individual, “in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, [to] use[,] carr[y] [or possess] a firearm . . . in furtherance of . . . such crime.” 18 U.S.C. § 924(c)(1)(A). Section 924(c)(3) goes on to define “crime of violence” as any “felony” that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” (use-of-physical-force clause); or “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (“residual clause”).

holding of a prior decision of the Court of Appeals for the circuit in which the district court is located until that binding precedent is expressly overruled.” (citation omitted)); *accord D’Ambrosio v. Bagley*, 688 F. Supp. 2d 709, 721 (N.D. Ohio 2010) (“This is a district court, and it must follow binding precedent when such precedent exists.”).

V. CONCLUSION

For the reasons discussed, Petitioner’s § 2255 motion [Doc. 54] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

AN APPROPRIATE ORDER WILL ENTER.

/s/ *Travis R. McDonough*

TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE